82-830

No. ——

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IN THE

# Supreme Court of the United States

**October Term, 1982**

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MOSHE MENORA on behalf of SHOLEM MENORA, a minor; GILDA ALLSWANG on behalf of RONALD ALLSWANG, a minor; RABBI ABRAHAM BRUCKENSTEIN on behalf of RONALD BRUCKENSTEIN, a minor; BERTON WEINER on behalf of MICHAEL WEINER, a minor; DR. BERNARD SERED on behalf of MITCHELL SERED, a minor; HEBREW THEOLOGICAL COLLEGE, INC.; and IDA CROWN ACADEMY OF ASSOCIATED TALMUD TORAHS, INC.; individually and on behalf of all others similarly situated,

*Petitioners,*

*v.*

ILLINOIS HIGH SCHOOL ASSOCIATION, an unincorporated association and LAVERE L. ASTROTH, in his official capacity,

*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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SYLVIA M. NEIL
SHIRLEY R. DVORIN
American Jewish Congress
22 W. Monroe Suite 2102
Chicago, Illinois 60603
(312) 332-7355

DAVID A. GROSSBERG
30 North LaSalle Street
Chicago, Illinois 60602
(312) 580-2036

NATHAN Z. DERSHOWITZ
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-2500

*Counsel for Petitioners*

## QUESTIONS PRESENTED

1. Did the Court of Appeals err in shifting to petitioners the burden of initially demonstrating that no alternative forms of religious observance could be devised which did not conflict with the state's interests?

2. Did the Court of Appeals err when it overturned the District Court's findings of fact without applying the clearly erroneous rule, on the ground that the clearly erroneous rule does not apply to facts it characterized as "legislative" as opposed to "historical"?

3. Did the Court of Appeals err in determining that the state's interest was compelling by considering only the abstract reasons which motivated adoption of the rule, rather than the District Court's factual findings that the rule as applied to petitioners did not in practice advance that interest?

## TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Table of Contents | ii |
| Table of Authorities | iv |
| Constitutional Provisions and Rules | vi |
| Opinions Below | viii |
| Jurisdiction | ix |
| Statement of the Case | 1 |
| Reasons for Granting the Petition | 13 |
| I. The Decision of the Court of Appeals Placing the Burden of Proof on Petitioners is Inconsistent with the Prior Decisions of This Court | 14 |
| II. The Compelling State Interest Test Requires A Court to Determine the Factual Impact of A Rule and Such Findings Are Subject to the Clearly Erroneous Rule | 21 |
| A. The Court of Appeals Erred in Not Applying the Clearly Erroneous Rule | 22 |
| B. The Historical, Not Legislative Facts Are Relevant in Determining Whether the State Has a Compelling Interest | 24 |
| Conclusion | 28 |

Appendix

Court of Appeals

Opinion . . . . . 1a

Dissent . . . . . 26a

Opinion Denying Petition for Rehearing . . . . . 1b

Vacate and Remand Order. . . . . 1c

Stay of Mandate . . . . . 1d

District Court:

Opinion of the District Court. . . . . 1e

Temporary Restraining Order . . . 1f

## TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| Ashwander v. T.V.A., 297 U.S. 288 (1936) | 20 |
| Commissioner v. Duberstein, 363 U.S. 278 | 23 |
| Larson v. Valente, 102 S.Ct. 1673 | 21 |
| McDaniel v. Paty, 435 U.S. 617 (1978) | 26, 27 |
| Pullman-Standard v. Swint, U.S. , 102 S.Ct. 1781 (1982) | 22 |
| Redmond v. GAF, 574 F.2d 897 (7th Cir. 1978) | 19 |
| Schweizer v. S.D.H.R, 48 N.Y. 2d 294 (1979) | 19 |
| Sherbert v. Verner , 374 U.S. 398 (1963) | 17, 19, 20, 26, 27 |
| Thomas v. Review Board of the Indiana Employment Security Division, 450 U.S. 707 (1981) | 17, 19, 21 |
| U. S. v. Ballard, 322 U.S. 78 (1944) | 19 |
| Wisconsin v. Yoder, 406 U.S. 205 (1972) | 16, 27 |

Constitutional Provisions, Statutes and Rules

Fed. R. Civ. P. 52(a). . . . . 13

Fed. R. Civ. P. 52(e). . . . . 5

Fed. R. Civ. P. 65(a)(2) . . . . . 5

First Amendment, United States Constitution . . . . . passim

National Federation of State High School Associations 1980-81 Basketball Rule 2-2 . . . . . passim

National Federation of State High School Associations 1981-82 Basketball Rule 3.5 . . . . . vii

28 U.S.C. § 1343(3) . . . . . 5

Other Authorities

5A Moore's, Federal Practice, 52.01(4) 2d ed. (1982). . . . . 23

Nagle, The Ever Widening Scope of Fact Review in Federal Appellate Courts - Is the Clearly Erroneous Rule Being Avoided?, 59 Wash. U.L.Q. 409 (1981) . . . . . 23

## CONSTITUTIONAL PROVISIONS AND RULES

U. S. Const. Amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

Fed. R. Civ. P. 52 (a):

> [F]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses....

National Federation of State High School Associations (Federation) 1980-81 Basketball Rule 2-2:

> The referee shall not permit any players to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Barrettes made of soft material are legal. Head bands no wider than two (2) inches made of non-abrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

Federation 1981-82 Basketball Rule 3.5:

> The referee shall not permit any players to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Head bands no wider than two (2) inches made of non-abrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

## OPINIONS BELOW

The opinions of the United States Court of Appeals for the Seventh Circuit are reported at 683 F.2d 1030 (7th Cir. 1982).* Its initial opinion is reprinted in the Appendix at 1a with the dissent appearing at 26a. The opinion denying the petition for rehearing is reprinted at 1b. The opinion of the United States District Court for the Northern District of Illinois is reported at 527 F. Supp. 637 (N.D. Ill. 1981) and is reprinted at 1e.**

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* Petitioner, Hebrew Theological College, Inc. is a not-for-profit corporation. Petitioner Ida Crown Academy is a school of the Associated Talmud Torahs, Inc., a not-for-profit corporation. There are no parent, subsidiary or affiliated companies.

** The reported opinion of the United States District Court of Respondents' motion for recusal is no longer at issue in these proceedings. The recusal decision is reported at 527 F. Supp. 632 (N.D. Ill. 1981).

## JURISDICTION

The judgment of the Seventh Circuit was filed June 30, 1982. A timely petition for rehearing was denied with dissent on August 18, 1982. This petition is filed within ninety days of that denial. This Court has jurisdiction under 28 U.S.C. § 1254(1)

## STATEMENT OF THE CASE

Petitioners, two Orthodox Jewish high schools and members of their interscholastic basketball teams, brought suit against the Illinois High School Association (IHSA), the organization that regulates interscholastic basketball in Illinois, charging that the IHSA's rule prohibiting players from wearing headgear violated the players' Free Exercise rights. The individual petitioners alleged that, as male members of the Orthodox Jewish faith, they are required, with limited exceptions not relevant here, to cover their heads at all times as a sign of respect to G-d, in whose presence they believe themselves always to be. The sincerity of their religious belief is unchallenged.

The schools, Ida Crown Academy and the Hebrew Theological College, had played interscholastic basketball under the auspices of the IHSA for eight years and

three years, respectively. This case arose when the IHSA decided to enforce against petitioners its rule prohibiting all headgear (except headbands) during basketball play* and informed petitioners that they

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* Rule 2-2 provided:

> The referee shall not permit any players to wear equipment which, in his or her judgment, is dangerous to other players. Elbow, hand, finger, wrist or forearm guard, cast or brace made of hard unyielding leather, plaster, pliable (soft) plastic, metal or any other hard substance, even though covered with soft padding, shall always be declared illegal. Head decorations, headwear, or jewelry are illegal. Barrettes made of soft material are legal. Headbands no wider than two (2) inches made of non-abrasive unadorned, single color cloth, fiber, soft leather, pliable plastic or rubber are legal.

The provision permitting soft barrettes was deleted from the rule after the District Court entered temporary injunctive relief and found that, for safety purposes, a yarmulke is the functional (although not the religious) equivalent of a soft barrette. The District Court pronounced itself troubled "to encounter what appears to be a pretextual basis" for deletion of the soft barrette exception. (13-20e; 24-25e; 37-40e).

would not be allowed to participate in interscholastic basketball unless the team members played without yarmulkes (skull caps), the traditional headcovering of Orthodox males. (13e).

Up to that point, petitioners had fulfilled their religious obligation by wearing yarmulkes secured by several bobby pins or clips during basketball play. They asked the IHSA to waive its headwear rules for them and to permit them to wear securely fastened yarmulkes, but the IHSA refused to permit any headcovering not specifically permitted by its rules. In February 1981, Rabbi Jerald Isenberg, the assistant dean of students of Hebrew College wrote the IHSA seeking clarification of the headwear rule. In response, IHSA wrote

> It is the opinion of the IHSA that skull caps, securely fastened would be a violation of 1981 National Federation Rule 2-2 and we cannot waive the rule. (Emphasis added.)

On February 19, 1981, the IHSA requested an interpretation of the no-headwear rule from the National Federation of State High School Associations (Federation) which drafted the basketball rule book used by the IHSA:

> Would rule 2-2 allow skull caps to be worn if they were not attached by bobby pins or other types of clips which could be judged as hazardous?

The Federation's response was short and to the point:

> [S]ince headwear, other than a headband, is illegal the method of attachment is not a concern.

(15a; 27-9a).

Throughout the proceedings, the repondents have maintained this position.*

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* See testimony of respondents' witness, Richard O. Schindler, (editor of basketball rule book), TR. 29, p. 25-6, 34; Respondent's Response to the Motion for a Temporary Restraining Order.

On February 23, 1981, the District Court, whose jurisdiction was invoked pursuant to 28 U.S.C. § 1343(3), entered a temporary restraining order enjoining the respondents from prohibiting petitioners' participation in interscholastic basketball. On November 3, 1981, the case for permanent declaratory and injunctive relief was tried, pursuant to Fed. R. Civ. P. 65(a)(2). On November 17, 1981, the District Court entered findings of fact and conclusions of law, pursuant to Fed. R. Civ. P. 52(e).

The District Court found, as fact, that interscholastic basketball competition, the sole interscholastic athletic activity of the two schools, is an important educational experience that contributes to the physical and emotional health and development of students and that the schools' inability to participate in

interscholastic basketball would have a material negative impact on the schools and their students. (11-12e). The court further found that slips and falls are common in the game of basketball. There was, however, no evidence of even a single instance of slipping resulting from a yarmulke, hair clip or bobby pin, and, indeed, testimony by witnesses with substantial experience in coaching, observing and refereeing thousands of basketball games in which players on one or both teams wore yarmulkes reflected not a single instance of either slippage or injury from either yarmulkes or their associated bobby pins or clips. (20-23e). The Court also found that ISHA had not adopted all feasible rules to improve safety. (23-25e; 36-37e). On that record, the Court concluded that the risks posed by yarmulkes and their appurtenances are totally speculative.

The District Court concluded that IHSA had not shown a compelling interest in safety which would outweigh the petitioners' First Amendment rights. The Court ordered the IHSA to allow the petitioners to participate in interscholastic basketball without requiring them to remove head coverings worn in accordance with their religious beliefs. (33-34e; 39-40e; 43e).

The Court of Appeals for the Seventh Circuit reversed, over a dissent, vacated the District Court's decision and remanded the case.

The majority stated the question presented to it was an asserted "religious . . . obligation while playing basketball to

wear a yarmulke fastened to [the] hair by bobby pins." (Court's emphasis) (13a). Adopting a concept from the jurisprudence of conflict of laws, the court ruled that the case presented a "false conflict" because the petitioners

> have no constitutional right to wear yarmulkes insecurely fastened by bobby pins.

Expressly rejecting uncontroverted evidence in the record, and ignoring the clear language of the rule, the majority opinion assumed that the IHSA did not prohibit the wearing of secure headcoverings. (15 a). Notwithstanding the IHSA's unbending position and its strict adherence to the letter of the rule, the Court was "reasonably sure that a secure headcovering exists or can be devised at trivial cost without violating any tenet of Orthodox Judaism." (15a).

The majority asserted that the purpose of the no headwear rule is to promote safety (6a). It stated that it did not consider IHSA's failure of proof regarding the hazards of yarmulkes on the basketball court "quite so devastating" as the District Court did. (17a). The majority found that "affixing of the yarmulkes to the head (more precisely, the hair) by bobby pins. . . happens to be an inherently insecure method of keeping the yarmulkes atached during basketball play." (3a; 14a). Contrary to the District Court's explicit factual findings, the majority found that yarmulkes so fastened fall off in the heat of play with some frequency. (3a). It maintained, again contrary to the District Court, that experience with interscholastic basketball games in which players wear yarmulkes has been limited and that "we do not know how many of the

falls that occur in games when players are wearing yarmulkes are due to that fact -- we do not even know whether falls are more common in such games -- than in games where the IHSA's rule is enforced." (17-18a).

The Court stated

> [T]he plaintiffs had the burden of proving that their first amendment rights were infringed by the association's no-headwear rule, we are constrained on this record to conclude that they failed to make out a case. (21a).
>
> . . .
>
> If the plaintiffs can totally allay the state's safety concern at zero, or practically zero, cost to them, they must do so. Otherwise the state's concern, even if relatively slight, will be a compelling interest in relation to the (non) burden on the plaintiffs' religious freedom. (20-21a).
>
> . . .
>
> The District Court should retain jurisdiction so that the plaintiff can have an opportunity to propose to the Association (IHSA) a form of secure head covering that complies with Jewish law yet meets the Association's safety concerns. If the Association refuses to interpret or amend its rules to allow such a head covering to be worn by Orthodox Jews, the District Court should then proceed to determine, consistently with the analysis in this opinion, the plaintiffs' right to have the rule enjoined as a violation of their religious freedom. (21-22a). . . .

> We put the burden of proposing an alternative, more secure method of covering the head on the plaintiffs rather than on the defendants because the plaintiffs know so much more about Jewish law." (22a). (emphasis added)

The dissent rejected the majority's assertion that petitioners alleged a "non-existent burden" when they were denied an exception to the no-headgear rule. (27a). The dissenter stated that:

> the conclusive and unambiguous ruling by the Federation was that all head-wear, other than headbands, is illegal regardless of the method of attach-ment. (emphasis in original). (28-29a),

and that he was "not prepared to second-guess Judge Shadur's evaluation of the alleged safety hazards. (30-31A). Furthermore, the dissent maintained that the majority "overlooked" prevailing principles of constitutional law by placing the burden of accommodation on petitioners rather than IHSA. (30a).

In an opinion denying petitioners' request for a rehearing in this case (again over dissent), the Court of Appeals explained that the clearly erroneous rule for overturning the District Court's findings of fact was inapplicable because that rule was designed for historical facts not "legislative" facts. (2-3b). The Court of Appeals, noting the importance of the issue, also elaborated on its ruling regarding burden of proof, stating:

> "We placed on the plaintiffs only the burden of demonstrating that there is in fact a conflict between the state's interest in safety and their interest in complying with all those requirements of Jewish law. If they can comply fully with all those requirements yet still meet fully the state's concern with safety, . . . then they would not be accommodating their religious beliefs to secular commands...." (4-5b). (emphasis added)

## REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue because the Court of Appeals for the Seventh Circuit decided this case by applying novel and unprecedented theories involving the allocation, as well as the extent of, the parties' burdens in a case raising claims under the Free Exercise Clause. The Court below imposed upon a plaintiff the burden of proving that no accommodation of his religious practices was possible.

It also substantially reduced the state's burden in such cases by holding that the District Court was obligated to weigh the state's interest, not in light of the actual operation of its rule, but upon the "legislative" facts which moved the state to impose the rule in the first place. Finally, it ignored the limitations on appellate review imposed by Fed. R. Civ. P. 52(a), holding the clearly erroneous

rule inapplicable to "legislative" facts, and overturning findings that were not "legislative" without applying the rule.

The implications of the majority's constitutional analysis for future Free Exercise cases, together with its unprecedented expansion of the scope of appellate review of factual determinations, establish that this case is sufficiently important to justify the issuance of the writ of certiorari.

## I. The Decision of the Court of Appeals Placing the Burden of Proof on Petitioners is Inconsistent with the Prior Decisions of this Court

The decision of the court below conflicts with the decisions of this Court in cases arising under the Free Exercise Clause. This Court has imposed only one burden on a plaintiff in a case such as this -- that of demonstrating a conflict between a religiously motivated practice and some governmental requirement. Once that burden has been met, this Court has placed the burden of showing that the

state's interests are sufficiently compelling to justify the restriction on religious freedom and that the practice is the least restrtictive means of fulfilling that interest where they logically belong -- on the state.

The court below radically shifted this allocation of burdens. It recognized that petitioners' religious observances were in conflict with the IHSA's rule prohibiting all headwear -- a rule the record shows respondents have obstinately refused to modify or waive to accommodate petitioners' religious practices.

Yet the court below refused to decide the only question left in the case -- whether the interest served by the no headwear rule was sufficiently compelling, given the overwhelming, uncontradicted factual showing that the fear of accidents was speculative, to outweigh plaintiffs'

Free Exercise rights. Rather, the court below required petitioners to prove, as a preliminary matter, that no accommodation of their religious belief and the safety interest which gave rise to the rule was possible. In doing so, it relied on the conflicts of law theory of "false conflicts." The Court of Appeals cited no authority for the application of this rule to Free Exercise cases.

The procedure this Court has established for Free Exercise Clause cases is illustrated by Wisconsin v. Yoder, 406 U.S. 205 (1972). This Court, stating that only compelling state interests are sufficient to override a Free Exercise claim, held that once the plaintiffs had established a conflict between state law and their practices it fell to the state to prove that its interest was superior:

> It was incumbent on the State to show with more particularity how its admittedly strong interest in compulsory education would be adversely affected by granting an exemption to the Amish.

Accord, Thomas v. Review Board of the Indiana Employment Security Div., 450 U.S. 707 (1981).

And in Sherbert v. Verner, 374 U.S. 398, 407-08 (1963), this Court thought it to be "plainly . . . incumbent upon [the state] to demonstrate that no alternative forms of regulation would combat . . . abuses without infringing First Amendment rights."

The parties in the District Court followed the burdens set forth in Yoder and Sherbert. Petitioners proved that the practice of covering their heads while playing basketball was in conflict with the IHSA's rule prohibiting headwear. The IHSA asserted an interest in preventing accidents. Petitioners challenged this interest by evidence suggesting that it was not advanced by the rule. The District Court found as a fact that the state's interests were not advanced by the rule.

The Court of Appeals departed from this framework, holding that petitioners had not proved, as a preliminary matter, that no accommodation of their religious beliefs was possible. This holding flies in the face of the parties' factual stipulation and the District Court's independent finding of fact.

More to the point, this additional burden of proof, while subtle in appearance, is radical in its implications. The existing formulation deals with identifiable conflicts between religious practices as observed by adherents of a particular faith, and an identifiable government policy. The Court of Appeals' formulation requires the parties to produce proof, and a court to determine, whether there are alternative observances which would both satisfy religious requirements and the state's interest. Indeed the court below undertook such an inquiry (3a, 13-14a, 23a).

If this new burden of proof is to be more than a pro-forma burden of pleading, a court would be required to pass on the correctness of plaintiffs' assertions that no other practice will satisfy their religious beliefs. Such an inquiry is forbidden by Thomas. See also U. S. v. Ballard, 322 U.S. 78 (1944); Cf. Sherbert v. Verner, supra, 374 U.S. at 407. No case decided by this Court has ever imposed such a burden of proof on a Free Exercise claimant.*

Exacerbating the new burden on courts and parties to explore alternative forms of observance is the insistence that the religious observance and its alternatives be measured not only against the official formulation of the governmental policy, but

* The lower federal and state courts have held that the burden of seeking out, or devising, accommodation of an employee's religious practices as mandated by Title VII of the 1964 Civil Rights Act, is upon the employer. Redmond v. GAF Corp., 574 F.2d 897 (7th Cir. 1978); Schweitzer Aircraft Corp. v. S.D.H.R., 48 N.Y. 2d 294 (1979).

against the underlying interest which finds expression in the formal policy. One can easily imagine, under this rule, a motion to dismiss at the end of the plaintiff's case because he speculated incorrectly about the nature of the state's interest. In Sherbert v. Verner, 374 U.S. 398 (1963), for example, the interest asserted by South Carolina before this Court was different from the interests it asserted below. 374 U.S. at 407.

The rule adopted by the court below was advanced as a method to avoid a constitutional adjudication. (22a). See Ashwander v. T.V.A., 297 U.S. 288 (1936). It will not do so here, for the record establishes that respondents object to any accommodation of petitioners' religious practices. Moreover, in all cases the rule adopted below will not avoid constitutional questions because in each case a court will

be required to determine whether the inquiry called for runs afoul of Thomas' constitutionally rooted prohibition on official inquiry into the validity of a religious practice. See, Larson v. Valente, 102 S.Ct. 1673, 1689 (1982) (Stevens, J., concurring).

## II. The Compelling State Interest Test Requires a Court to Determine the Factual Impact of a Rule and Such Findings Are Subject to the Clearly Erroneous Rule

The court below departed from well settled principles of both the First Amendment and appellate review when it rejected the factual findings of the District Court that the rule did not, in fact, advance the respondents' interest in safety.

The Court of Appeals escaped the force of the District Court's factual findings by holding that the relevant inquiry was not how the rule functioned in practice, i.e., whether accidents had in fact occurred, but

rather whether respondents, in enacting their rule, believed that the rule would advance safety. The latter inquiry, termed "legislative" by the court below, was held not subject to the clearly erroneous standard ordinarily applicable to the review of factual findings. (2-3b).

A) The Court of Appeals Erred in Not Applying the Clearly Erroneous Rule

The Court of Appeals cited no authority in support of its holding on the inapplicability of the clearly erroneous rule. This Court's opinion in Pullman-Standard v. Swint, 102 S.Ct. 1781, 1789 (1982), makes it unquestionably clear that the Court of Appeals erred:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous."

The notes of the Advisory Committee to Rule 52 state likewise.

See 5A Moore's Federal Practice, 52.01 (4) (1982); Nagle, The Ever Widening Scope of Fact Review in Federal Appellate Courts - Is the Clearly Erroneous Rule Being Avoided, 59 Wash. U. L. Q. 409 (1981). See also Commissioner v. Duberstein, 363 U.S. 278, 291 (1960).

Even assuming the validity of the Court of Appeals' novel distinction, the findings it overturned are not "legislative;" rather, those facts (summarized below) are "historical."*

* The Court of Appeals overturned the District Court's findings that: 1) Yarmulkes secured by bobby pins or clips fall infrequently from the head during basketball play; 2) "Substantial experience" with interscholastic basketball games, and innumerable non-interscholastic play, with players wearing yarmulkes reveals no falls or slips caused by yarmulkes; 3) Soft barrettes are the "functional equivalent" of yarmulkes; 4) The IHSA had absolutely prohibited petitioners' wearing of headcoverings; (continued on next page)

B) The Historical, Not Legislative, Facts Are Relevant in Determining Whether the State Has a Compelling Interest

The more fundamental error of the court below was its focus on respondents' belief in the need for a no headwear rule, as opposed to the District Court's focus on the actual operation of the rule. This shift in emphasis is entirely inconsistent with this Court's Free Exercise decisions. If left to stand, it would eviscerate the protections that clause offers religious dissenters.

The Court of Appeals balanced petitioners' religious beliefs against the IHSA's interest in safety in the abstract (5b). But, as the District Court held,

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(footnote continued)
5) The evidence is uncontroverted "that prohibiting yarmulkes does not serve a 'compelling state interest'"; 6) Respondents eliminated a provision of their rules permitting soft barrettes in order to undercut the court's findings on the TRO; 7) The petitioners' sincere religious beliefs mandated headcoverings at all times, with only the most limited exceptions, none of which is here relevant.

this

> argument involves an impermissible sleight of hand: It falsely equates basketball safety with prohibiting yarmulkes. Basketball safety is of course a legitimate IHSA goal. [T]his lawsuit is about ... not the abstract question of whether IHSA can decree basketball safety, but rather the specific question whether it can prohibit the wearing of yarmulkes and override the exercise of First Amendment rights. (40e).

As to that question, the District Court pointed out the total absence of proof of real, not speculative, hazards and the views of basketball coaches and referees that permitting the wearing of yarmulkes does not create a safety hazard.

In every Free Exercise case there will presumably be "legislative" facts to justify the regulation and the resulting impingement on an individual's rights. But this Court has constantly demanded far more to rebuff a Free Exercise claim.

In Sherbert v. Verner, supra, the state asserted that it could deny Sherbert, whose religion prohibited Saturday work, unemployment benefits for turning down employment which required such work, in order to prevent fraudulent claims. Without denying the significance of preventing such claims, the Court held that the failure to establish as a fact that allowing an exemption for religiously based claims would result in fraudulent claims defeated the state's defense.

McDaniel V. Paty, 435 U.S. 617 (1978), struck down Tennessee's constitutional disqualification of ministers from membership in the legislature. While noting that the state's interest in preventing the establishment of religion was "of the highest order", the Court concluded that Tennessee had "failed to demonstrate that its views of the danger of clergy participation in the political

process have not lost whatever validity they may once have enjoyed". Id. at 628.

There likewise was no question that, in the abstract, Wisconsin had a compelling interest in requiring children to have some secondary school education. Under the rule adopted by the court below, that "legislative" fact would have ended the case. It did not. Instead, in Wisconsin v. Yoder, supra, this Court analyzed in detail the operation of that rule upon the Amish, and the effect upon the state's interest of an exemption for the Amish. Finding no significant likelihood of harm to the state's interest in fact, this Court held for the Amish.

In this case, the record shows even more convincingly than did the records in Sherbert, McDaniel, or Yoder, that, whatever respondents may have thought originally, experience demonstrated that

an exception to the no headwear rule would create only the most remote -- if that -- possibility of harm. Such a remote, hypothetical showing is not sufficient under this Court's cases to discharge the state's burden of justifying an infringement on Free Exercise rights.

## CONCLUSION

Whether petitioners are able to compete in interscholastic sports is not, perhaps, of any great moment except to the adolescents involved. But the legal principles invoked by the Court below in deciding that question adversely to the petitioners threaten to deny both the petitioners and all those whose religious practices do not conform to the norm the protections the Free Exercise Clause was intended to confer.

Accordingly, a writ of certiorari should issue to review the judgment below.

Sylvia M. Neil
Shirley R. Dvorin
American Jewish Congress
Suite 2102
22 West Monroe Street
Chicago, Illinois 60603
(312) 332-7355

David A. Grossberg
30 North La Salle Street
Chicago, Illinois 60602
(312) 580-2036

Nathan Z. Dershowitz
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500